

October 11, 2005

Lynn Tracy Nerland  
Assistant City Attorney  
The City of Pleasanton  
*[Address Redacted]*  
Pleasanton, CA 94566-0802

**Re: Your Request for Informal Assistance  
Our File No. I-05-190**

Dear Ms. Nerland:

This letter is in response to your request for advice on behalf of Councilmember Matt Sullivan regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Because you do not seek advice regarding a specific governmental decision, we can provide you only informal assistance.<sup>2</sup>

### **QUESTION**

Does his employment by a consulting firm that is compensated to assist public utilities with grant administration disqualify Councilmember Sullivan from participating in decisions to apply for a grant to fund an energy saving program, or from participating in decisions to accept such a grant?

### **CONCLUSION**

Councilmember Sullivan will have a conflict of interest in governmental decisions that have reasonably foreseeable material financial effects on the consulting firm in which he has an economic interest. You also seek advice on the impact of Government Code section 1090; unfortunately, we do not have authority to provide advice under Government Code section 1090 because it is not part of the Act.

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Regulation 18329(c).)

## **FACTS**

The State of California Public Utilities Commission (“PUC”) requires public utilities like Pacific Gas & Electric (“PG&E”) to collect a fee from ratepayers to support programs that promote energy savings. There are a variety of programs, some focused on energy saving efforts at the local government level, others on energy saving efforts at universities, and other state-wide rebate programs for replacing older, inefficient appliances. Local agencies or consortiums of local agencies may submit applications for such program grants. For example, the Association of Bay Area Governments (“ABAG”) might submit an application for a grant to replace light bulbs in traffic signals throughout the Bay Area with more energy efficient light bulbs.

The PUC requires public utilities such as PG&E to administer the funds collected from the ratepayers and to oversee the application and grant process. The PUC still retains the ultimate authority to approve proposed projects that are recommended by PG&E. The PUC also requires that third-parties be allowed to compete to administer some of the programs funded by the fees collected from the ratepayers.

The City of Pleasanton has not directly submitted an application to PG&E for funds. However, some of the PG&E grants are available to Pleasanton residents and businesses. The City has received and may continue to receive technical advice on energy efficiency issues funded through a grant from PG&E to ABAG, which is available to the City because it is a member of ABAG. It is possible that in the future the City might receive grant funds either directly in response to a successful proposal that it submits or indirectly through the efforts of a local government consortium.

Councilmember Sullivan has recently begun employment with Newcomb, Anderson & McCormick (“Newcomb”) a consulting firm that assists PG&E with energy savings programs focused on local governments. In its consulting activities, Newcomb may discuss program ideas with prospective applicants, review applications, make recommendations and oversee successful grant applications for PG&E, to ensure that any grant funds are being spent properly. It is possible that Newcomb could also bid directly to implement an energy-efficient program, although it is not doing so at present.

Councilmember Sullivan is presently an employee with this 5-person firm, but may become a partner in the future.

## **ANALYSIS**

The Act does not bar public officials from non-governmental employment during their tenure as public officials. However, a public official may have a conflict of interest in certain governmental decisions that have reasonably foreseeable material financial effects on one or more of the official’s economic interests, including his or her economic interests in a non-governmental employer. In such cases, the official is ordinarily disqualified from taking any official role in the governmental decision.

Your question requires that we consider whether Councilmember Sullivan may have disqualifying conflicts of interest in decisions regarding grant applications, resulting from his economic interest in the firm which employs him. You acknowledge in your request for advice that Councilmember Sullivan is a “public official” within the meaning of the Act, and that he would be making, participating in making, or using his official position to influence a governmental decision by acting in his official capacity in any city council decision authorizing submission of a grant application, or the city’s acceptance of grant funds.

You also acknowledge that Councilmember Sullivan has an economic interest in the consulting firm, as a source of income under section 87103(c), and separately under section 87103(d) as an employee of the firm. You have asked us to discuss only the economic interest that Councilmember Sullivan has in the firm, but we note for the sake of completeness that a public official always has a financial interest in his or her personal finances. (Section 87103, regulation 18703.5) A reasonably foreseeable financial effect on a public official’s personal finances is material if it amounts to at least \$250 over any 12 month period. (Regulation 18705.5.) Your account of the facts does not suggest that decisions relating to Newcomb will have a personal financial effect on Councilmember Sullivan, so we will not discuss it further.

There is also a separate materiality standard which applies in cases where there is a “nexus” between duties owed by a public official to a source of income and to the official’s public agency. The materiality threshold is much lower when a public official is paid by a private person to accomplish some action within the official’s public decision-making authority. (Regulation 18705.3(c).) Your account of the facts does not reveal a “nexus” between Councilmember Sullivan’s public duties and his private employment, but we urge you to contact us if you suspect that there may in fact be such a nexus. Finally, if Councilmember Sullivan were to become a partner in Newcomb with an ownership interest of 10 percent or more in the firm, his income would also include a *pro rata* share of the firm’s income (section 82030(a)), raising a possibility that PG&E, or other clients of the firm, would become sources of income which *themselves* might be directly involved in grant decisions.

We take up your particular inquiry at Step 4 of the Commission’s standard, eight-step conflicts analysis.

#### **Step 4. Is the firm directly or indirectly involved in the decision at issue?**

The Act’s conflict-of-interest rules distinguish between economic interests that are directly involved in governmental decisions, and those that are only indirectly involved. In your request for advice you suggest that the firm would not be directly involved in such decisions, but you go on to question whether the firm would even be indirectly involved. In fact, these are the *only* possibilities.

Regulation 18704.1(a) provides:

“(a) A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official’s agency when that person, either directly or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Assuming that the firm is not directly involved in a governmental decision as described at regulation 18704.1, it is regarded as “indirectly” involved in the decision. Treatment as an “indirectly” involved entity means that the materiality of any effect on the firm is determined by the standards which set a disqualification threshold higher than that which would have applied if the entity were “directly” involved in the decision.

**Steps 5 and 6. Is it reasonably foreseeable that the decision will have a material financial effect on the firm?**

When the source of income is a business entity which is not directly involved in a governmental decision, the Commission assesses materiality by application of regulation 18705.1(c). The thresholds for materiality under this regulation vary with the size of the business entity. We do not know the size of Newcomb but, assuming that it is not publicly traded and it is of a relatively modest economic size, regulation 18705.1(c)(4) provides that the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year in the amount of \$20,000 or more; or,

(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more."

Councilmember Sullivan should of course consult regulation 18705.1(c) to ensure that he identifies the materiality threshold actually appropriate to his firm.

After determining the size of the economic effect that would be considered "material" to a firm like Newcomb, Councilmember Sullivan must next decide whether it is "reasonably foreseeable" that the effect of a given decision on Newcomb will reach the level of a "material" financial effect. (Regulation 18700(b)(6).) An effect is considered "reasonably foreseeable" if it is "substantially likely." (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) Whether or not the financial consequences of a governmental decision are "substantially likely" at the time the decision is made depends on the specific facts surrounding the decision. A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Id.*)

Because your question is general in nature and does not refer to a particular decision, we cannot at present offer you further advice on whether any upcoming grant decision might have a reasonably foreseeable, material financial effect on Newcomb. Your request for advice indicates that you do not anticipate that such decisions will implicate the "exceptions" to disqualification that are considered in Steps Seven and Eight of the Commission's standard analysis, so we conclude our analysis at this point.

We hope that this outline of the Act's application to the Councilmember's circumstances will prove useful. If he requires more specific advice on a particular upcoming decision, we will be happy to assist when the salient details are available.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca  
General Counsel

By: Lawrence T. Woodlock  
Senior Counsel, Legal Division

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